

APPEAL NO. 93398

On April 20, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). The issues to be determined at the hearing were: 1) whether the appellant (claimant herein) injured his back in a work-related fall on (date of injury), and 2) whether the claimant has had disability as a result of a work-related injury of (date of injury). After the issues were agreed to by the parties the claimant explained that his injury had occurred (date of injury), not (date of injury). The hearing officer determined that the claimant injured his legs but not his back in the course and scope of his employment on (date of injury), and further determined that the claimant has not had disability as a result of his compensable injury of (date of injury). The hearing officer awarded medical benefits to the claimant for the injury to his legs, but did not award temporary income benefits (TIBS) because the claimant had not shown that he had disability. The claimant disagrees with the hearing officer's findings that he did not injure his back and that he has not had disability. The respondent, who is a self-insured political subdivision of this State (employer herein), requests that the hearing officer's decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The claimant testified that on (date of injury), he was cleaning the inside of a machine which is used to move concrete road barriers when he fell through a hole in the floor of the machine. He said his right leg went through the hole and his fall was stopped by his left leg. The claimant said his back and both legs were hurt in the fall. He reported the accident to his supervisor, (Mr. C), who filled out an accident report on (date of injury), which the claimant signed. The report states that the claimant bruised both legs in the accident, but does not mention his back. The claimant testified that he did not tell his supervisor about hurting his back in the accident because it was not hurting that much when he reported the accident. The claimant said he did not seek medical attention for his injuries until November 1992 because he thought he was going to get better. The claimant further testified that he continued to work after the accident, but that his coworkers had to help him with some of his duties because his legs and back continued to bother him.

The claimant went on vacation the first week of November 1992. During his vacation he changed a tire on his pickup truck. He said a neighbor jacked up the truck, and that he, the claimant, changed the tire while sitting on a bucket. The claimant testified that sometime before going back to work he went to two hospitals and was diagnosed as having bursitis. After his vacation, the claimant returned to work on crutches. He testified that at that time he told his supervisor that he had been working at home on his truck and that he started having pain when he got up from sitting on the bucket. The claimant said that after about a week of working on crutches, his supervisor told him to go see a doctor. He went to (Dr. S) and then to Dr. V) who performed a laminectomy and discectomy for a herniated

disc in December 1992. The claimant returned to work in March 1993 when he was released to light duty work.

Two of the claimant's coworkers testified that they saw the claimant fall into the hole in the floor of the machine. Those two witnesses and another coworker testified that after the accident they helped the claimant with some of his job duties during the period he worked after the accident, that the claimant complained to them about his legs and back after the accident and while working after the accident, and that the claimant limped at work. These witnesses testified that they did not mention the claimant's problems to Mr. C, the supervisor, nor did they tell Mr. C that they were helping the claimant with his work.

Mr. C testified that when the claimant reported the accident to him, the claimant said he had hurt his legs, but did not mention anything about his back. Mr. C said that an employee meeting was held every morning and that he was out in the field with the employees at least once or twice a day. He further testified that from May to November 1992, the claimant never told him about a back injury and that during that time period he was not told anything by the claimant or other employees, and he did not observe anything, which indicated that the claimant was having any difficulty performing his job. However, he also said that the claimant may have mentioned to him one time after reporting the accident that his legs were still bothering him "a little bit." He said that when the claimant returned to work on crutches after the November vacation, the claimant told him that he was sitting on a bucket while working on his truck and that when he got up he heard a "pop" in his back. He said he had talked to the claimant's doctor and that the doctor told him he thought "it" was job-related "due to the heavy lifting." This witness further testified that the claimant was off work between November 24, 1992, and March 15, 1993, and that the claimant has been performing light duty work since March 15, 1993.

An October 30, 1992, report from an emergency department of a medical center states that the claimant was diagnosed as having traumatic bursitis of the right knee. No history of that condition is related in the report. A November 4, 1992, patient instruction form indicates that the claimant received emergency medical care on that day, but does not contain a diagnosis or a history. It states "no weight bearing at all for 3 days, use leg wrap, take medicine as directed, return for any problems." Another patient instruction form dated November 13, 1992, from the same medical center as the November 4th form indicates that the claimant received emergency medical care on November 13th, but does not contain a diagnosis or a history. The general instructions part of the form is illegible except for the word "crutches."

In a letter dated December 11, 1992, Dr. S stated that he first saw the claimant on November 24, 1992; that his diagnostic impression was lumbar radiculopathy; that in spite of conservative medical treatment the claimant's condition worsened; that on December 6, 1992, the claimant was admitted to a hospital for pain control and evaluation; that an MRI

and lumbar myelogram revealed a lumbar disc herniation at L5-S1 with nerve root involvement; and that Dr. V and (Dr. M) both agreed that the claimant needed surgical treatment. Dr. S's patient note of November 24, 1992, recites that "injury occurred 1 week October 1992 while at home. Sitting for a long time in (sic) a bucket." In a report dated December 16, 1992, Dr. S recited that the claimant was admitted to the hospital on December 6, 1992, "after experiencing severe low back pain for the past four to five weeks associated with severe pain of the right thigh." In a letter dated March 10, 1993, Dr. S stated that when he first saw the claimant on November 24th, the claimant complained of severe leg pain and numbness of his right thigh and that "apparently, [the claimant] had been sitting for a long period of time on a bucket working at home on his truck. After some time of sitting he felt a sharp leg pain with numbness on his thigh." Dr. S further stated that:

At this point several things could have contributed to [the claimant's] medical spinal disease: 1: his age, 2. his weight, 3. the type of work his (sic) does (heavy lifting, frequent bending and stooping). It is most likely that the sitting on the bucket was only a triggering factor for his spinal disease.

A December 6, 1992, nursing admission assessment report for the hospital where the claimant had his surgery contained the following history: "Pain started 5-6 weeks ago sat on low bucket to work on car & pain started (5-6 wks ago) `pain just won't stop.' Pain in low back goes down Rt leg. Rt leg feels tingley - numbness." Another hospital admission note also dated December 6, 1992 reflected that the claimant gave a history of severe low back pain for the past four to five weeks. In a December 6, 1992, consultation report, Dr. V stated:

The patient is a 45-year-old male who sustained an injury to his low back while working in September [September is the month stated in the report] of 1992. He does not remember the exact date, but it is documented. Apparently, he was working on a HOV machine and slipped through the floor twisting his right leg and back. Since that time he has complained of low back pain up until about four to five weeks ago when he was working on his truck and had a minor twist to his back and had increased back pain with right radicular pain. Since then he has complained of quite severe right radicular pain down the posterolateral right thigh radiating to the right heel of the foot associated with tingling, numbness and some weakness.

Dr. V also stated in the history portion of his consultation report that the claimant had no history of any back surgery or previous back problems.

Other medical records revealed that various diagnostic tests were done in early December 1992, that the claimant was diagnosed as having a herniated disc at L5-S1, and that Dr. V performed a laminectomy and discectomy on the claimant on December 11, 1992,

after obtaining a second opinion on spinal surgery from Dr. M, and that Dr. V released the claimant to light duty work on March 15, 1993. In a letter dated March 10, 1993, Dr. V recited the history of the injury as he had in his consultation report of December 6, 1992, referring to a low back injury when the claimant slipped through the floor of the machine at work in September 1992. However, in the March 10th letter Dr. V does not mention anything about the claimant working on his truck or sitting on a bucket.

As previously noted, the first issue at the hearing was whether the claimant injured his back in a work-related fall on (date of injury). However, the claimant stated that his fall occurred on (date of injury), not May 28th. The hearing officer found that on (date of injury), the claimant injured his legs but did not injure his back when he fell into a hole in a vehicle he was cleaning as part of his duties for his employer. The hearing officer is the finder of fact in a contested case hearing and is the sole judge of the weight and credibility to be given to the evidence. Articles 8308-6.34(e) and (g). The hearing officer resolves conflicts and inconsistencies in the evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The evidence concerning whether the claimant injured his back at work on (date of injury), was conflicting. Basically, the history of the back injury as reflected in several medical reports conflicts with the testimony of the claimant and his witnesses. The claimant said his back injury occurred on (date of injury), when he fell at work, and his witnesses said he complained of back pain after the fall. The fact that he fell at work on May 27th is undisputed. However, he did not seek medical treatment for five months and, for whatever reason, the medical reports do not recite a history of back pain or injury stemming from an accident on May 27th. In fact, an accident of May 27th is not mentioned in the medical reports. Instead, the histories recite back pain from various other events, including an accident at work in September 1992, an injury at home in October 1992, sitting on a bucket working on a truck at home in November 1992, or an aggravation of a September 1992 back injury by the work on the truck in November 1992. The claimant testified that he felt pain after changing a tire on his truck while sitting on a bucket and Mr. C testified that the claimant told him he felt a "pop" in his back at that time. There was no testimony concerning a September 1992 work-related back injury. It is only mentioned in the medical reports of Drs. V and M. When presented with conflicting evidence, as in this case, the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). Having reviewed the record in this case, we conclude that there is sufficient evidence to support the hearing officer's finding that the claimant injured his legs, but not his back, in a work-related fall on (date of injury), and that the finding is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App.-Waco 1980, no writ).

The second issue at the hearing was whether the claimant has had disability as a result of a work-related injury of (date of injury). Again, the claimant stated that the injury occurred on May 27th and not May 28th. "Disability" is defined as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). The hearing officer found that the claimant's injuries of (date of injury), have not caused him to be unable to obtain and retain employment at wages equivalent to his preinjury wage, and concluded that the claimant has not had disability as a result of his compensable injury of (date of injury). The evidence showed that, except for his vacation in the early part of November 1992, the claimant continued to work for his employer at his regular job until November 24, 1992, that the claimant returned to work for his employer in a light duty position at his preinjury wage on March 15, 1993, and that the claimant was working for the employer as of the date of the hearing on April 20, 1993. Although not articulated at the hearing, it would appear from the evidence that the period of claimed disability was November 24, 1992 to March 15, 1993 when the claimant was not working. The claimant's preoperative diagnosis was a L5-S1 disc herniation for which he had back surgery on December 11, 1992. We think that it is reasonable to conclude from the diagnosis and subsequent surgery that the claimant was off work due to his back condition and back surgery. Since we have found the evidence sufficient to support the hearing officer's finding that the claimant did not injure his back in a work-related fall on May 27th, and the reason the claimant was off work was his back condition, it follows that the claimant's inability to obtain and retain employment at preinjury wages was not due to his compensable injury because the compensable injury does not include the claimant's back injury for which he was off work.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge